IN THE COURT OF COMMON PLEAS
PAULDING COUNTY, OHIO

BARBARA JEAN MORRIS, *et al.*,

Plaintiffs,

v.

THE STATE OF OHIO,

Defendant.

Case No. CI 18 190

Judge Tiffany Beckman

REPLY MEMORANDUM OF SENECA COUNTY RESIDENTS WHO LIVE IN CLOSE PROXIMITY TO PROPOSED WIND TURBINE PROJECTS IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

The Affected Residents[1] moved this Court to intervene as defendants in this action because the disposition of this action may impair or impede their critical interests and rights—as individuals who own residences in the "footprint" of or near proposed wind turbines projects—that the statutory setbacks of R.C. 4906.20 and 4906.201 challenged by the Plaintiffs in this case are designed to protect. Plaintiffs oppose the Affected Residents' intervention for a number of reasons, none of which have merit. This Court should grant the motion to intervene.

[1]The Affected Residents are Anthony & Tamra Andrews, Aaron & Carrel Boes, Tim Cornett, Jim Dillingham, Steve Gitcheff, David & Joann Graham, Charles & Kimberly Groth, Jeffrey & Deanne Hamilton, John & Terri Hampshire, Duane & Deb Hay, Gary & Dawn Hoepf, Joseph & Dianne Hudok, Brandon & Danette Martin, Michael & Cristal McCoy, Jeffrey & Marnie Miller, Nathan & Stephanie Miller, Charles & Linda Morsher, Tom & Beth Nahm, Kevin & Jennifer Oney, Jim & Vickie Seliga, Gregory & Janeen Smith, Tom & Shelley Smith, Donald & Kimberly Thompson, Robert & Judith Watson, Rod & Nancy Watson, and Bonnie Wright. In their Memorandum in Opposition to the Motion to Intervene ("Memorandum in Opposition"), Plaintiffs refer to the Affected Residents as the "Seneca Residents."

II. ARGUMENT

Plaintiffs first assert that the Affected Residents lack an adequate interest in this action. See Memorandum in Opposition at 8-10. However, the Affected Residents' property rights and interests that they seek to protect by intervention in this case are the mirror image of the same property rights that Plaintiffs assert as the basis for their standing to challenge the validity of H.B. 483's amendments to R.C. 4906.20 and 4906.201 in the first intstance. See Complaint at ¶8 ("The Plaintiffs have standing to bring this action because they are challenging the constitutional validity of portions of a statute (H.B. 483) that increase the statutory minimum wind turbine setbacks, *which increase adversely affects the Plaintiffs if allowed to stand.*") (emphasis added). Plaintiffs allege that they are property owners who desire to place a wind turbine on their properties, but are prevented from doing so by H.B. 483's setback requirements, see Complaint at ¶¶2-4, and that the bill, therefore, interferes with their rights as property owners.

Should Plaintiffs prevail, however, the Affected Residents' identical rights as property owners—property owners who do not wish to have wind turbines placed on or around their properties—would be adversely affected. Neighboring property owners are the very people the amended setback requirements of R.C. 4906.20 and 4906.201 are designed to protect. This is not, therefore, litigation involving the mere "interpretation" of a statute, see Memorandum in Opposition at 8, but rather litigation that challenges the validity of statutes specifically designed to protect the Affected Residents' rights and interests. If Plaintiffs have standing to challenge the setback requirements as affected property owners, then the Affected Residents necessarily have the same standing to defend the setback requirements as affected property owners.

Plaintiffs next incorrectly contend that "the outcome of this action will only affect the law pertaining to wind turbine setbacks in Paulding County." Memorandum in Opposition at 9-10.

See also Memorandum in Opposition at 3 ("The Seneca Residents also ignore the jurisdictional boundaries of this Court's decisions, which will only affect the law in Pauling County."). This assertion is contrary to the factual allegations made and the relief sought in Plaintiffs' Complaint.

Plaintiffs challenge the amendments to R.C. 4906.20 and 4906.201 that were contained in House Bill 483 enacted by the 130th Ohio General Assembly in 2014. Complaint at ¶¶29-37. That challenge is to an enactment of the General Assembly that applies statewide, not just to property located in or residents of Paulding County.[2] The declaration that Plaintiffs seek—"that the wind H.B. 483 Wind Turbine Setback provisions are unconstitutional . . . ," Complaint at 13—would invalidate the enactment of the General Assembly and would necessarily, therefore, affect property owners and residents throughout the entire state. Indeed, "[if] the . . . statute is unconstitutional, it '* * * is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'" *Primes v. Taylor*, 43 Ohio St.2d 195, 196-97 (1975) (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)). A declaration that the amendments to R.C. 4906.20 and 4906.201 are unconstitutional would, therefore, directly implicate the interests of the Affected Residents regardless of their county of residence.

Moreover, in addition to the a declaration of unconstitutionality, Plaintiffs seek "[a] preliminary and permanent injunction prohibiting Defendant [State of Ohio] from enforcing the H.B. 483 Wind Turbine Setback provisions . . . ." Complaint at 13. Certainly, as an agency of the State of Ohio, the Power Siting Board would, if Plaintiffs are successful in this litigation, be prevented from applying the setback amendments to any project, including those that abut the

[2]Indeed, it would likely have been unlawful for the General Assembly to enact wind turbine setback requirements that applied only in Paulding County. See Ohio Const., Art. II, §26 ("All laws, of a general nature, shall have a uniform operation throughout the state . . . .").

Affected Residents' residences and property (and which are currently before the Ohio Power Siting Board in certification proceedings). The Affected Residents do, therefore, have a direct interest in the subject matter of this litigation.

Plaintiffs also assert that the Affected Residents' lack an interest in this action and that their ability to protect their interests will not be impeded by this litigation because "they are effectively advocating against the proposed projects [in Seneca County] before the [Ohio Power Siting Board]." Memorandum in Opposition at 10. Once again, Plaintiffs ignore the allegations and relief sought in their Complaint. Plaintiffs seek a declaration that HB 483's amendments to R.C. 4906.20 and 4906.201 are unconstitutional, and an injunction against the state prohibiting their enforcement. The Power Siting Board is an agency of the State of Ohio, see R.C. 4906.02(A), and would, if Plaintiffs are successful in this litigation, be prevented from applying the setbacks amendments to any project, including those projects that the Affected Residents currently oppose before the Board. Thus, a declaratory judgment in this case may directly impair or impede the Affected Residents' ability to protect their rights in the pending Power Siting Board certification proceedings.

More importantly, the Power Siting Board, as an administrative agency, lacks the power or authority to rule on the issue raised in this case—the constitutionality of a statute that it administers. "It is settled that an administrative agency is without jurisdiction to determine the constitutional validity of a statute." *State ex rel. Columbus Southern Power Co. v. Sheward,* 63 Ohio St.3d 78, 81 (1992). See also *State ex rel. Kingsley v. State Employment Relations Bd.,* 130 Ohio St.3d 333, 336, 2011-Ohio-5519 at ¶18. Plaintiffs cannot achieve before the Power Siting Board the result they desire in this case—a declaration that the amendments to R.C. 4906.20 and 4906.201 are unconstitutional. And more importantly, the Affected Residents cannot defend the

constitutionality of those amendments before the Power Siting Board—while those statutory protections are being collaterally attacked in this case. The issue of the constitutionality of the amendments to R.C. 4906.20 and 4906.201 will necessarily be decided by a court of competent jurisdiction—such as this Court—and the Affected Residents must be given a voice before this Court to protect their rights and interests that are put at risk in this case.

Plaintiffs additionally assert that the Affected Residents should not be allowed to intervene in this case because their interests are adequately represented by the State. Of course, the adequacy of the State's representation of the Affected Residents' interests is not solely determined by the fact that the State and the Affected Residents are seeking the same ultimate outcome. See *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) ("[T]he government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him."). That the State and the Affected Residents seek the same outcome goes more appropriately to whether the Affected Residents—should intervention be granted—be aligned as plaintiffs or defendants. The fact that the State and the Affected Residents seek the same ultimate outcome properly suggests that the Affected Residents should be aligned as defendants, just as they presented in their Motion to Intervene.

But the interests of the State and the Affected Residents are not the same in this litigation. The State seeks to uphold the validity of its statutes and the public policy of this State as declared by the General Assembly. The State is not an individual, non-participating property owner who resides next to property on which developers propose to situate a wind turbine. The State is not an individual that would be put at risk of suffering physical harm or adverse health effects from living too close to wind turbines. Indeed, while the State has acted to protect neighboring

residents by enacting wind turbine setback requirements, it is not itself one of the individuals that the setback requirements are designed to safeguard. The State's interests and the Affected Residents' interests are simply not the same. A declaration that the amendments to R.C. 4906.20 and 4906.201 are unconstitutional would affect the State and the Affected Residents in completely different ways. No other party currently in this case represents the Affected Residents' rights and interests. The Affected Residents must be allowed to intervene to protect the rights and interests that are unique to them.

Plaintiffs also make the specious argument that the Affected Residents must not be allowed to intervene in this case because the law firm that represents them also represents "the coal industry"—as well as other individual residents and property owners—in proceedings before the Power Siting Board. Memorandum in Opposition at 5 & 14. The argument is completely irrelevant to the Affected Residents' intervention rights. However, the Court should note that Plaintiffs have failed to disclose that their counsel represents numerous wind developers in various proceedings, including the developer in the *Icebreaker Windpower* case cited in Plaintiffs' Memorandum in Opposition and the developer (Paulding Wind Farm IV, LLC) of the "commercial wind facility actively being developed in the area" that is referenced in paragraphs 2-4 of Plaintiffs' Complaint. By Plaintiffs' faulty logic, the fact that the Affected Residents' legal counsel has represented other opponents of wind turbine projects in other cases should prevent the Affected Residents from intervening in this case; but the fact that Plaintiffs' own legal counsel represents numerous wind turbine developers in other cases should not prevent them from bringing this case in the first instance. It appears that Plaintiffs are disciples of Ralph Waldo Emerson's famous aphorism, "[a] foolish consistency is the hobgoblin of little minds. . . ."

Again, the identity of other clients that the Affected Residents' counsel represent in separate, unconnected litigation is utterly irrelevant to whether the Affected Residents are entitled to intervene in this action. Attorneys for the Affected Residents are not seeking to intervene in their own right; they are seeking intervention on behalf of the Affected Residents.

Finally, Plaintiffs assert that the Affected Residents should not be granted permissive intervention (as set forth herein, they are entitled to intervene as of right) because "[t]here is no question that if the Seneca Residents are permitted to intervene both Plaintiffs and the State will be subjected to undue delay and prejudice regarding their pursuit of efficient adjudication." Memorandum in Opposition at 13. See also Memorandum in Opposition at 2 ("If the Seneca Residents are permitted to intervene, this action will surely be bogged down in protracted litigation that will prejudice the efficient adjudication of the rights of both Plaintiffs and the State."). This assertion is wholly without merit. The Affected Residents promptly sought intervention at the very outset of this case rather than sitting on their rights and seeking intervention at a later stage of the litigation. There has been no discovery in the case, and the Court has not held any hearings or set a trial date. Should this Court grant intervention, the Affected Residents, as parties, would be subject to the very same rules of procedure and scheduling orders issued by this Court that govern the conduct of the Plaintiffs and the State,[3] eliminating any opportunity to unduly delay the proceedings.

Perhaps that is why Plaintiffs fail to specify how the Affected Residents' participation will cause "undue delay and prejudice." Indeed, Plaintiffs are reduced to wildly speculating that there could be "undue delay" because "[c]ounsel for the Seneca Residents also delay wind-

[3]Significantly, the State has not opposed the Affected Residents' Motion to Intervene—and Plaintiffs have not objected to the standing of the Ohio Environmental Council to file an *amicus* brief in support of Plaintiffs in this case.

energy projects by appealing [Power Siting Board] approvals." Memorandum in Opposition at 6. Of course, the legitimate exercise of a right of appeal in completely separate litigation can hardly establish any threat of "undue delay" in this case.[4] Quite simply, Plaintiffs can make no showing whatsoever of any undue delay or prejudice that would result from the Affected Residents intervening in this case.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Affected Residents' Memorandum in Support of their Motion to Intervene, the Affected Residents respectfully urge this Court to grant their Motion to Intervene.

Respectfully submitted,

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[4]Moreover, the legitimacy of appeals filed by counsel for the Affected Residents from certain rulings of the Power Siting Board in other cases is confirmed by the Ohio Supreme Court's recent reversal of a Board ruling in the very *Black Fork Wind Energy* litigation cited by Plaintiffs in their Memorandum in Opposition. See *In re Application of Black Fork Wind Energy, L.L.C.*, 2018-Ohio-5206.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email this 11th day of January, 2019 upon the following:

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